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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

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United States of America,

CR. #99-40061

Plaintiff,

-vs-

SENTENCING

Martin Uphoff,

Defendant.

* * * * *

BEFORE: The Honorable Lawrence L. Piersol
Chief United States District Judge
For the District of South Dakota
Sioux Falls, South Dakota

APPEARANCES: Ms. Rita D. Allen
Assistant United States Attorney
Sioux Falls, South Dakota
Attorney for the Plaintiff.

Mr. Steven G. Haugaard
Attorney at Law
Sioux Falls, South Dakota
Attorney for the Defendant.

PROCEEDINGS: The above-entitled matter came on for
hearing on the 9th day of December,
1999, commencing at the hour of 11:00
a.m. in the courtroom of the Federal
Building, Sioux Falls, South Dakota.

1 THE COURT: Appearances, please.

2 MS. ALLEN: Rita Allen, Assistant United States
3 Attorney, for the government.

4 MR. HAUGAARD: Steve Haugaard appearing on behalf
5 of Martin Uphoff.

6 THE COURT: I apologize for the delay in starting
7 this morning. Part of it was reading the things that were
8 filed this morning. And I think not only the motion by the
9 defense, but likewise the various family letters. And I've
10 read all those things.

11 All right. Now, in addition to those things, is
12 there any evidence that the defense wishes to introduce
13 with regard to the sentencing?

14 MR. HAUGAARD: No, Your Honor.

15 THE COURT: Does the government have any evidence
16 it wishes to introduce?

17 MS. ALLEN: No, Your Honor.

18 THE COURT: With regard to the objection to
19 Paragraph 39, it says that the Paragraph 39 should refer to
20 the testimony of Doctor Paul, and Paragraph 39 does refer
21 to the testimony of Doctor Paul, but I think that the point
22 that -- so it does refer to -- Paragraph 39, as I say, does
23 refer to testimony of Doctor Paul. I think that the
24 presentence report, you know, the writer doesn't have the
25 advantage of having sat through the entire trial and heard

1 all the testimony, and the transcript of the entire trial
2 is not available at this point. So while the jury verdict
3 was clearly supported by the evidence in my opinion, as
4 I've already ruled, I think that some of the testimony at
5 trial was in support of the defendant with regard to his
6 mental illness, and the effect of it was somewhat stronger
7 than Paragraph 39 states. And I make that notation for the
8 record in part so that the people in the Bureau of Prisons
9 that are doing the assigning of the defendant to a facility
10 can be aware that that's the Court's view, and that they
11 don't look just at the presentence report because I sat
12 through the trial, and the writer doesn't have that
13 advantage. So, you know, to that extent, the objection to
14 Paragraph 39 is granted.

15 I don't believe any of the objections with the
16 exception, of course, of the request to depart downward
17 affect the offense level. Is that correct, Mr. Haugaard?

18 MR. HAUGAARD: I think that's correct, Your
19 Honor.

20 THE COURT: All right.

21 MR. HAUGAARD: I guess I would correct myself
22 only to the extent that, as I believe I mentioned in my
23 motion for downward departure, I believe the criminal
24 history is over-stated in light of the fact that the priors
25 were committed during the same period of time essentially.

1 It was apparently -- sentencing took place at the same
2 time. And --

3 THE COURT: Go ahead.

4 MR. HAUGAARD: Then in addition to that, I do
5 believe the defendant accepted responsibility for his
6 actions in light of his testimony, so I believe he should
7 be given credit for that also.

8 THE COURT: First of all, with regard to your
9 points that you raised in your memo with regard to that
10 being the same manic episode, even if it were, the two
11 incidents were about a month apart, which doesn't prevent
12 it from being in the same manic episode, but it would mean
13 there would be two separate arrests. And for the
14 sentencing guidelines on a criminal history, if you have
15 two separate arrests, you know, for something that happened
16 at different times, those are considered separate, even if
17 they were, you know, as you've argued, a part of same manic
18 episode.

19 Now, on the other hand, do you have any evidence
20 that -- aside from being sentenced at the same time on both
21 of those unrelated -- I think unrelated instances, with the
22 exception that even -- I say unrelated without regard to
23 the manic episode argument, but do you have any evidence
24 that the arrest was one arrest separated by a month and
25 quite different events? I assume they were two different

1 arrests.

2 MR. HAUGAARD: I believe they were. I think
3 there is also some -- as I was trying to do research for
4 this, I believe there is some support for the Court
5 recognizing that some of these incidents over-represent --
6 the criminal history is over-represented given various
7 factors. And the fact that permeates this case is the
8 mental illness. And so it's on that basis I believe it's
9 over-represented.

10 As I was going through the Guidelines Digest, I
11 found some -- one additional case, U.S. versus Govan, 152
12 F.3d 1088 which made reference to over-statement of
13 criminal history. And those are the -- I haven't reviewed
14 the cases myself, but -- other than the blurb in the
15 digest, but these are the kind of situations I believe that
16 you are given discretion to consider whether it's
17 over-represented or --

18 THE COURT: What page in the digest?

19 MR. HAUGAARD: It's on Page 806.

20 THE COURT: First Circuit, Eleventh Circuit?

21 MR. HAUGAARD: Didn't note that. It's on Page
22 811, third case from the end of the digest. A Nevada case.

23 THE COURT: I'm sorry, I can't hear you. 811 and
24 what?

25 MR. HAUGAARD: 811, and it's a Nevada case, the

1 third case from the end of the page.

2 THE COURT: I see. Ninth Circuit case. Well,
3 yes, I mean that's clearly the law, and I depart fairly
4 often on that basis if I think that the criminal history
5 significantly over-represents the seriousness of a criminal
6 record or the likelihood that someone will commit further
7 crimes.

8 What does the government have to say about that?

9 MS. ALLEN: With regard to whether the criminal
10 history has been over-stated in this case, it's been
11 under-stated. It shows basically the conviction in 1994
12 and violation of protection order conviction in 1994. The
13 record that was made when we gave notice of intent to use
14 evidence of other crimes was an affidavit of Mr. Uphoff's
15 ex-wife, and that affidavit certainly indicated that there
16 had not been one incident, but several incidents where the
17 defendant has broken into her home. And, in effect, the
18 defendant admitted the same on the stand.

19 But in any event, there were -- it was not just
20 one violation of the protection order which is a Class 1
21 misdemeanor in state court. The evidence was that there
22 were a series of burglaries which are felonies in state
23 court. And also with regard to whether it was a manic
24 episode or whether he was competent at the time, he was
25 represented at the time, he -- an evaluation was conducted

1 after I believe the charge for violation of protection
2 order. So his competency or the seriousness of the
3 offense, of the number of offenses that occurred, certainly
4 isn't a case where the criminal history was exaggerated.

5 THE COURT: Well, but I have to decide this on
6 the record that I have, including the presentence
7 investigative report. And the other things you talk about,
8 Miss Allen, in terms of several other break-ins which you
9 claim in the nature of burglaries and clearly violations of
10 protection orders, I don't have anything in the record with
11 regard to that, so I don't believe I can consider that in
12 determining whether the criminal history is under-stated or
13 over-stated.

14 MS. ALLEN: Well, with regard to what is in the
15 presentence report, there are the two offenses, and
16 there's -- they occur at different times, so -- they may
17 have been sentenced at one time. I believe there are two
18 judgments on that also.

19 THE COURT: I wasn't talking about that. I was
20 talking about the other things that you argued, you know,
21 with with regard to other incidents. I'm without any
22 judgments or police reports or anything. I can't consider
23 those because they are not in the PR, they are not in the
24 record, they weren't brought up at the trial either.

25 MS. ALLEN: I believe that they were brought up

1 at trial as far as the burglary was concerned. I believe
2 that was his testimony. The government is not asking for
3 the Court to find that the criminal history was
4 under-stated. But definitely criminal history has not been
5 over-stated in this case.

6 THE COURT: The breaking into the house was
7 brought up at trial, but I thought that was the same thing
8 as Paragraph 24 of the presentence report. Now, at trial
9 the fact that he made contact with his two children wasn't
10 brought up, as I recall. What was brought up was that the
11 defendant broke into his ex-wife's house which had been his
12 house, too, I suppose, but wasn't --

13 MS. ALLEN: That's right.

14 THE COURT: So are you claiming that this one
15 point is different than the incident that was brought up at
16 trial?

17 MS. ALLEN: I think that may be correct, and I
18 could be corrected here, but I think he was maybe charged
19 with two -- was he charged with two violations of the
20 protection order?

21 MR. HAUGAARD: Not that he recalls.

22 MS. ALLEN: That's possible. I'm not sure.

23 THE COURT: Well, does the -- Miss Zimbelman, do
24 you have any information on that one way or the other?

25 PROBATION OFFICER ZIMBELMAN: The information

1 that I have is what is in the presentence report of those
2 two incidents of arrests.

3 THE COURT: Because, of course, you don't have
4 the benefit of having been at trial, and -- well, what was
5 brought out at trial, I've summarized it as best I can
6 recollect, which didn't have to do with the two children,
7 but had to do with breaking into the house which also would
8 have been a violation of the protection order, among other
9 things. But I don't know if that's the same incident as is
10 reflected in Paragraph 24 because at trial it wasn't pinned
11 down, you know, so closely with regard to date because, of
12 course, Paragraph 24 of the presentence report has it
13 because it has a date of disposition.

14 Well, the reason, of course, whether it's one
15 criminal history point or two is important is because of
16 the possibility of the application of safety valve under
17 the guidelines, and because of the five qualifying
18 criteria. First one is the defendant does not have more
19 than one criminal history point as determined in the
20 sentencing guidelines. But the second point is that -- of
21 the five is that the defendant did not use violence or
22 credible threats of violence or possess a firearm or other
23 dangerous weapon in connection with the offense. So the
24 question under the second point would be whether the
25 defendant did not use violence or credible threats of

1 violence, and the guidelines list arson as a crime of
2 violence, 4B1.2, Application Note 1.

3 So I'm getting ahead a little bit, but
4 nonetheless, the defense raised also the safety valve
5 application because -- but under the definition, I don't
6 see that safety valve can fly because of part two, without
7 regard to the criminal history question. Do you have any
8 other authority on that point, Mr. Haugaard?

9 MR. HAUGAARD: Well, I was hoping that I could
10 find some. The other thing that I observed is that I think
11 it would be somewhat related to something in the nature of
12 an unloaded gun or something like that. But also the
13 portion of it that refers to the credible threat of
14 violence. There's -- the incident itself took place at a
15 time when no one was around, there was no credible threat
16 of violence toward anyone. And so based on that, I think
17 that it's, again -- as I've looked at this case, he just is
18 on the edge of all the criteria. And it's given that
19 circumstance that I think that the general authority, the
20 purpose and intent of the guidelines, gives the Court the
21 authority to recognize that, and to do the just thing.

22 Personally I think the case -- and categorize it
23 with similar cases where maybe it hadn't been arson.
24 Maybe -- I was thinking a similar situation would be where
25 someone would come to the federal building and attack the

1 door people. How much damage would be there, what kind of
2 offense would that be. So anyway, I just don't think it's
3 a credible threat of violence. So I think that's a
4 potential for exception.

5 MS. ALLEN: Your Honor, with regard to the
6 incident, I'm looking at the affidavit of Mrs. Uphoff, and
7 those are -- they are different incidents because the
8 affidavit was signed in '92. The other charge is '94, so
9 they are definitely two incidents.

10 THE COURT: Couldn't hear the last of what you
11 said.

12 MS. ALLEN: They are definitely two incidents
13 because the affidavit which was the basis of the breaking
14 into the home was signed in 1992, and the other charge
15 arose in 1994, so they are two separate incidents.

16 THE COURT: Is that in the record some place?

17 MS. ALLEN: Yes. On the notice of intent -- the
18 document is government's resistance to motion in limine and
19 second notice of intent to submit evidence of other crimes,
20 wrongs or acts. And the affidavit that was attached to
21 that answering affidavit is a four-page affidavit, and it
22 is signed July 22nd, 1992.

23 THE COURT: All right. Let me ask the clerk what
24 docket numbers those are. I have -- it's Docket 63. Just
25 a moment. You are you talking about the answering

1 affidavit of Kellee Uphoff?

2 MS. ALLEN: Yes. And then also on the first page
3 of the government's resistance to which that is attached it
4 does refer to checking himself into the psychiatric ward in
5 February of 1992.

6 THE COURT: Just a moment. (Brief pause.) Yes,
7 it does look like the one we talked about at trial is 1992,
8 and then the other matter is 1994.

9 I find that the criminal history category does
10 not over-state the defendant's criminal history. Criminal
11 history category II does accurately reflect the defendant's
12 criminal history. I say that because I have to, in my view
13 as a judge, rule on the basis of the facts involved, even
14 if I would prefer to have the latitude to apply the
15 exception so that the Court could, if it chose, apply
16 5C1.2. But criminal history points are two, and I think
17 Mr. Uphoff earned them, and I can't change that. And it
18 would be improper for me to do that in order to reach an
19 end where I would like to have more latitude under the
20 guidelines.

21 Then with regard to point two, 5C1.2, of the
22 application of that limitation on statutory minimum
23 sentences, 4B1.2 and (a)(1) simply says arson. And when
24 you look at the statute then, of course the federal statute
25 18 United States Code Section 844(i) splits it out. And

1 for instance, it would have been -- if a personal injury
2 would have resulted to any person, then it's a mandatory
3 minimum of not less than 7 or more than 40 years. But, of
4 course, that wasn't the case, but that's why I -- this is a
5 mandatory minimum of five years instead. And guidelines do
6 not distinguish between the different, so to speak, levels
7 of arson, just arson. And so arson, with its potential for
8 danger to people, even though it didn't result in anything
9 happening to anybody in this instance -- nobody was even in
10 the building, nor was it implied anybody would be. Despite
11 that, under the guidelines, under 5C1.2, the defendant
12 wouldn't meet that criteria either. So 5C1.2 is not
13 available for those two reasons.

14 With regard to the defendant's acceptance of
15 responsibility, there can be acceptance of responsibility
16 if, for instance, there is a constitutional issue at stake
17 in a case, and it has to be tried in order to preserve the
18 issue. That wasn't the case here. It was -- it's true
19 that with regard to the operative facts, there wasn't too
20 much argument on those. The argument was with regard to
21 the defendant's capacity and state of mind at the time of
22 the offense conduct. But that's -- that is just simply
23 another element of the offense. Sometimes the element of
24 the offense is whether the defendant did it or not. That
25 wasn't the case here. But when it's just an element of the

1 offense, there is always at least one element of the
2 offense at issue or there wouldn't be a trial unless it is
3 a constitutional issue, preservation of some other unusual
4 things like that.

5 So acceptance of responsibility is not available
6 to the defendant here. That would have been available only
7 if the defendant under the facts of this case would have
8 pled to the offense, which he did not.

9 So the mandatory minimum is applicable. And
10 there is no basis available to the Court for a downward
11 departure in this case. So the mandatory minimum of 60
12 months is applicable.

13 With regard to the other points raised by the
14 defense objection one to Paragraph 10 is overruled. The
15 objection to Paragraph 11 is overruled. The facts at trial
16 support that reckless endangerment during flight. I take
17 that from the testimony that was given at trial. I've
18 overruled the objection to Paragraph 12 because there is
19 not an acceptance of responsibility within the meaning of
20 of the guidelines. Paragraph 4 of the objections is
21 overruled. That deals with Paragraphs 14 through 22, and
22 2B1.3 was the appropriate application. Paragraph 5 is
23 overruled. There is no evidence to the contrary other than
24 the objection itself.

25 The additional information considered written in

1 Paragraph 6 which deals with Paragraph 2 itself of the
2 presentence report, I considered the additional information
3 with regard to the defendant's father continuing to suffer
4 from bipolar disorder and he continues to experience manic
5 disorders which resulted in hospitalizations during the
6 defendant's trial. And I will note for the record also
7 with respect to the father's history, that one of the
8 letters deals with that also, with regard to the father
9 actually being in an episode and being hospitalized shortly
10 after the trial. And so the information in Paragraph 29 is
11 accepted and considered by the Court for sentencing.

12 With regard to Paragraph 32, which is defendant's
13 Objection 7, I'm not going to retry the divorce case, but I
14 believe what is stated in Paragraph 32, from what I've
15 gathered in the trial and elsewhere in this case, is
16 substantially correct. That objection is overruled.

17 The objection to Paragraph 37 is overruled. I
18 think that was largely supported at trial. There was
19 contrary testimony, too. But I think Paragraph 37 is an
20 accurate statement -- is an accurate statement.

21 I've already commented on Paragraph 39, and want
22 the people at Rochester or wherever the defendant goes or
23 whoever determines where he goes to likewise pay a good
24 deal of attention to Doctor Paul's diagnoses because he has
25 treated the defendant for a long time.

1 Or of the problems with the mandatory minimum
2 sentence is, of course, that absent the safety valve
3 applying, and I've already ruled that safety value doesn't
4 apply in this case, and that deprives the Court of the
5 ability to do anything other than the mandatory minimum.
6 Of course, the mandatory minimum comes out above the range
7 of the guidelines. The guideline range is 41 to 51 months.
8 The mandatory minimum is 60 months.

9 All right. Are there any objections that you
10 have made, Mr. Haugaard, that I haven't ruled upon now?

11 MR. HAUGAARD: I don't believe so, Your Honor.

12 THE COURT: Mr. Uphoff, is there anything you
13 would like to say before sentence is entered?

14 THE DEFENDANT: Your Honor, I would like to show
15 you that there is a good side to me. Up until now I think
16 you've only seen the bad side. I hope that you see that I
17 am an ordinary person 99 percent of the time. I never have
18 had a drinking or drug problem. I regularly participate in
19 church activities, including recently two trips to Grand
20 Forks, North Dakota for restoration after flood damage. I
21 frequently contribute to the local charities. And I'm not
22 looking for a pat on the back, but I want you to see that I
23 am not just a man out looking for trouble.

24 In July, '99, I started taking Depakote. Most
25 doctors say that this will help mania, which is the

1 problem. In most cases if a person has an illness,
2 authorities concentrate on dealing with it. People with
3 mental illnesses have a difficult burden to deal with. Why
4 are these people treated or why are these people served an
5 additional burden of incarceration where they are unable to
6 get help. We would not put a blind man in jail for
7 crossing the street at the wrong time. Why are mentally
8 ill treated differently?

9 Your Honor, it wasn't my intention to ask that
10 you release me for the time that I have served under your
11 conditions. Since age 14 through the present time, I've
12 been required to serve a substantial amount of time in
13 jails, in mental institutions due to my mental illness.
14 Your mercy would be greatly appreciated. Thank you.

15 THE COURT: Thank you. Anything further,
16 Mr. Haugaard?

17 MR. HAUGAARD: I guess I would just like to cite
18 some information for the record I guess. It's in the
19 Guidelines Digest, Page 791, there is a reference to I
20 believe it's the case of U.S. v. Leandre, 132 F.3d 796.
21 Down in the references there, about the middle of the page,
22 it indicates, "Downward departure under sentencing
23 guidelines for significantly reduced mental capacity
24 applies to all crimes equally, and may be considered by
25 sentencing judge even if the fact finder rejected the

1 defense of insanity or diminished capacity."

2 I make reference to that because I believe that,
3 as was stated in another case, guidelines do not and cannot
4 account for all factors and combination of factors that are
5 properly considered in sentencing, and the departure
6 mechanism acknowledges that. I think the departure in this
7 case -- I still think departure in this case is
8 appropriate.

9 THE COURT: Let me interrupt because, you know, I
10 do because you have been in front of me plenty of times.
11 The thing is, though, with a mandatory minimum, even if the
12 sentence -- even if it falls outside of the heartland, or
13 even if there are mitigating factors, frankly I'm without
14 authority to do anything about it unless you show me what
15 you quoted there is so. But that's the problem with
16 mandatory minimums, and that is why we shouldn't have
17 mandatory minimums unless you can show me some authority
18 beyond that.

19 MR. HAUGAARD: Well, I guess I can't other than
20 the fact of the cases I've cited. There's additional cases
21 that make reference to mitigating factors. There is the
22 case of U.S. v. Walters, 87 F.3d 663. It is a money
23 laundering case. The defendant received no benefit from
24 the crime. Similar, in this case, the defendant received
25 no benefit from this crime. There is -- there is no

1 purpose to it. He -- anything other than manic state. The
2 record knows that.

3 THE COURT: Walters wasn't a mandatory minimum
4 case though either.

5 MR. HAUGAARD: I understand, Your Honor. I cited
6 those cases for the record. I believe if the Court feels
7 it's bound by mandatory minimums, that that's inappropriate
8 consideration given all the other mitigating factors in the
9 case, given the fact of the individual's mental illnessess.
10 There are cases that I have come across, I don't know that
11 I made note of those specifics, but cases where the
12 departure took place because the defendant was a homosexual
13 and slight features, and so the Court determined it to be
14 inappropriate to incarcerate the individual.

15 Similarly in this case. Martin is going to find
16 himself in manic situations that guards will not recognize
17 until it's too late. And, again, I believe that endangers
18 Martin, other prisoners, the prison staff, and is patently
19 unfair to put him in that situation.

20 There is also departure to facility
21 rehabilitation, U.S. V Jones, 158 F.3d 492. And I think it
22 is disproportionate between this particular crime and that
23 it's a violation of the Eighth Amendment in regard to
24 punishment to punishment -- punish Martin Uphoff to the
25 extent that mandatory minimums call for. I think that's in

1 and of itself a basis for departure. I think there is a
2 sentencing disparity when you compare it to state offenses.
3 I don't think you can find a state offense which would come
4 up to these mandatory minimums given the circumstances.
5 Likewise, any of the federal offenses given the amount of
6 damage that was involved in the crime.

7 So combining all the things, the over-stated
8 criminal history, the purpose and intent of the sentencing
9 guidelines themselves -- they are intended to be
10 guidelines. They are not intended to be something that
11 would place a judge in a position of being unable to do
12 what he believed was just and merciful in a given case, but
13 just guidelines.

14 And that's why I think that the broad range of
15 authority granted in 5K2.0 states that the Court may depart
16 from the guidelines even though the reason for departure is
17 taken into consideration in determining the guideline range
18 if the Court determines that in light of unusual
19 circumstances the weight of that fact under under the
20 guidelines is inadequate or excessive. I think it's
21 clearly excessive in this case, to place this five year
22 sentence, given the circumstances.

23 I think I've cited all the cases I have I wanted
24 to cite, and I referenced as much as I could in my motion.
25 Didn't have enough time to pull all the cases like I prefer

1 to, but I think we have covered the general flavor of those
2 cases.

3 I would just like to state for the Court, too,
4 there are a lot of people who would have liked to have been
5 here today and speak on Martin's behalf, but I think that
6 gets to the point where we have covered this and covered
7 this and covered this. So I submit it to the Court, the
8 letters the family has sent, Doctor Paul and reference his
9 comments along the way. He had no doubt that Martin was in
10 a manic state at the time this took place, and he had
11 nothing to gain from coming in here and misstating anything
12 about Martin's condition. He was -- he has treated him for
13 long enough to know what is manic and what is not, and he
14 recognizes that this was a manic.

15 Martin's continuing to have problems as he is in
16 the jail even here trying to monitor his medications he is
17 on. He has continued tremors. They started Risperdal
18 recently, but that doesn't appear it's the reason for
19 tremors. They have to adjust the medication some more. I
20 think it's very important Martin have access to adequate
21 treatment.

22 I think his case is quite unusual. I'm sure my
23 bill in this case is several hundred now, and most cases
24 are not like Martin's cases. He has such subtle features
25 to his mental illness, that it's extremely difficult to see

1 those things. I think he's going to be placed in a
2 situation in a prison setting where -- even an unfamiliar
3 hospital setting where he is going to be in a position of
4 not receiving adequate treatment. So I would ask the
5 Court, whatever authority you have, whatever you can do, to
6 place him very close to family would be most appropriate.
7 And if his doctor could continue to monitor his condition,
8 I think that would be the best treatment possibility for
9 the time he will be incarcerated, given the benefit to the
10 extent they can test new medications and adjust
11 medications. But I think to do that, it needs to be in a
12 facility nearby.

13 Beyond that, I just ask that he receive credit
14 for all the time he has been held in custody prior to
15 sentencing, ask that you direct that Martin receive
16 treatment for his mental illness, be held close by. And
17 just as a final point, I -- as I said, I think the
18 guidelines are simply that, guidelines but not binding the
19 Court's hands. I think the Court has the authority to act
20 in a just, yet merciful, fashion, and I would ask that you
21 give him an appropriate sentence less than the mandatory
22 minimum.

23 THE COURT: Well, Miss Allen.

24 MS. ALLEN: Your Honor, the government relies on
25 its sentencing memorandum. And I would state to the Court

1 that I believe the cases -- Eighth Circuit cases of United
2 States versus Villar, V-i-l-l-a-r, 184 F.3d 801 (8th Cir.,
3 1999), and United States versus Rudolph, 970 F.2d 467,
4 (8th Cir. 1992), that they do control this case, and that
5 the mandatory minimum sentence does apply.

6 THE COURT: Well, and as I have already
7 indicated, I believe the mandatory minimum does apply.
8 It's no secret that sometimes I don't agree with the
9 guidelines. They are the law. But the guidelines are one
10 thing, and the Court does have more discretion than it used
11 to under the guidelines because of the Koon case and other
12 decisions. But then when you get to mandatory minimums,
13 that's another story. And the Court does not have
14 discretion under that. I'll state for the record that were
15 it not for the mandatory minimums, I would sentence the
16 defendant within the guidelines. The guideline range is 41
17 to 51 months. But that's not the case because mandatory
18 minimum applies.

19 With regard to some other matters that were
20 raised before sentence is entered, I want to state I have
21 in some instances departed downward because of endangerment
22 of a prisoner. Usually that is based upon a prisoner's
23 physical make-up, and sometimes their offense of conviction
24 coupled with it. In other words, victim profile. A person
25 who is also a child sex offender is a common thing that I

1 have departed on. There isn't, in my opinion, any basis of
2 endangerment to depart for Mr. Uphoff even if I had the
3 authority to do so.

4 I -- I've indicated that there's some difference
5 between the mandatory minimum and the sentencing guideline
6 range where I would prefer to be applying the sentencing
7 guidelines because it's just a mandatory number that
8 applies. I don't find Eighth Amendment violations, even
9 though there is some difference between the sentencing
10 guideline and the mandatory minimum, but Congress has been
11 found to be to be within their authority in establishing
12 the mandatory minimums.

13 I cannot assume that the defendant will not get
14 adequate treatment, and I will make a recommendation for
15 what I hope will be adequate treatment. I will recommend
16 credit for the time that the defendant has been in custody.

17 Would you please stand, Mr. Uphoff. I usually
18 make a statement briefly before a sentence is entered. I
19 recognize that there is a good side to you, and I think
20 that came through in your testimony, and in the trial, too,
21 to some extent, although it wouldn't sound like it to you
22 when you are the defendant and you are hearing all the
23 evidence against you. But nonetheless I recognize there is
24 a good side to you.

25 But I do want to point out that what you did was

1 more -- it was arson. That is why you are facing the
2 sentence you are. And you have a complicated medical and
3 psychiatric profile, and I'm sorry for that. I hope that
4 you get along as well as you can with that.

5 But the other part I want to point out, it makes
6 no difference to a victim the reason that they are a victim
7 for what you have done. And I have to tell you that I am
8 concerned about you in the future because from what has
9 been told -- hopefully medication will help you with your
10 condition, but it doesn't make any difference to a victim.
11 You know, there have been two instances now, and I hope
12 that there isn't a third, and I hope that when there is a
13 third, that somebody doesn't get injured because they can.
14 So that's the other side of the coin. You are a person of
15 intelligence, so you have to recognize that problem, too;
16 not only problems to yourself, but the problems you could
17 visit upon others.

18 Pursuant to the Sentencing Reform Act of 1984,
19 it's the judgment of the Court that the defendant, Martin
20 Uphoff, is hereby committed to the custody of the Bureau of
21 Prisons to be imprisoned for a term of 60 months on Count I
22 and six months on Count II, to be served concurrently. It
23 is recommended that the defendant serve his sentence at the
24 U.S. Federal Medical Center in Rochester, Minnesota.

25 The Court finds the defendant does not have the

1 ability to pay a fine, and the Court waives the fine in
2 this case. Mandatory drug testing is suspended based upon
3 the Court's determination that the defendant poses a low
4 risk of any future substance abuse.

5 Upon release from imprisonment, the defendant
6 shall be placed on supervised release for a term of three
7 years. This term consists of terms of three years on Count
8 I and a term of one year on Count II, with those terms to
9 run concurrent. Within 72 hours of release from the
10 custody of the Bureau of Prisons, the defendant shall
11 report in person to the probation office in the district to
12 which the defendant is released.

13 While you are on supervised release, Mr. Uphoff,
14 you are not commit another federal, state, or local crime,
15 shall not illegally possess a controlled substance, nor
16 possess a firearm or destructive device or other dangerous
17 weapon. You shall comply with the standard conditions that
18 have been adopted by this Court, and comply with the
19 following special conditions:

20 That you shall submit to a warrantless search of
21 your person, residence or vehicle at the discretion of the
22 probation officer; that you shall undergo inpatient or
23 outpatient psychiatric and psychological treatment as
24 directed by the probation officer; that you shall waive the
25 medical privilege that you may have with any treating

1 doctor, physician or psychologist with regard to the
2 probation officer communicating with that person and that
3 person and his or her staff with regard to your condition
4 during the time of your supervised release.

5 It's further ordered the defendant shall pay the
6 United States a special assessment of \$200, \$100 per count,
7 which is due immediately.

8 You have the right to appeal from the trial and
9 the judgment. And if you are going to appeal, you have to
10 file your notice of appeal within ten days after the
11 judgment is filed in your case, and probably be filed today
12 or tomorrow. Do you understand that right of appeal?

13 THE DEFENDANT: Yes.

14 THE COURT: All right. Thank you. You may be
15 seated.

16 Is there anything further to come before the
17 Court on this matter?

18 MS. ALLEN: Not from the government, Your Honor.

19 MR. HAUGAARD: Your Honor, I think I did say it,
20 but I just want to clarify, he does get time -- credit for
21 time served?

22 THE COURT: I recommend he does. That is subject
23 to Bureau of Prison regulations. My understanding is they
24 do consider that, and I do recommend it.

25 Very well. We are in recess.

1 (End of proceedings at 12:03 p.m.)

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5 STATE OF SOUTH DAKOTA)
6 COUNTY OF MINNEHAHA) :SS CERTIFICATE

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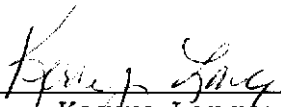
8 I, Kerry Lange, Court Reporter in the above-named
9 County and State, certify that the above-entitled
10 proceedings were reported by me, and the foregoing Pages
11 1 - 27, inclusive, are a true and correct transcript
12 of my stenotype notes.

13 Dated at Sioux Falls, South Dakota, this 13th day
14 of March, 2000.

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Kerry Lange

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